Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re **Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and "Preexisting" Subscription Services (*SDARS III*)**	**Docket No. 16-CRB-001-SR/PSSR (2018-2022)**

SIRIUS XM'S OPPOSITION TO SOUNDEXCHANGE'S REHEARING BRIEF

SoundExchange, in its Brief in Response to the Judges' April 17, 2018 Order ("SX Brief"), agrees with the premise on which Sirius XM sought rehearing: that to arrive at an appropriate measure of ARPU for converting the [redacted] per-subscriber royalty deemed appropriate by the Judges into an equivalent percentage-of-revenue rate, the revenues attributed to premium non-music programming in Sirius XM's Premier and All Access Packages and the credit card transaction fees incurred by Sirius XM must be added back in. SoundExchange further agrees that the specific amounts of such revenues identified by Sirius XM are also correct, and adds the same amounts in its own calculations. As Sirius XM has shown, the effect of making these now-conceded adjustments is to raise the ARPU to [redacted] and drop the resulting percentage-of-revenue rate down to 14.7%. That should end the rehearing inquiry and lead to a reduction in the SDARS royalty rate for the 2018-2022 license term from 15.5% to 14.7% in the Judges' Final Determination.

Disregarding the Judges' order to identify the royalty rate "between 14.7% and 15.5%" that the party alleges to be appropriate and *not* to provide an "alternative methodology for the calculation of ARPU" (Order at 9 & n.18), SoundExchange improperly devotes the remainder of its briefing to diversionary and specious arguments to why the rate should in fact *increase* to 16.85%. This position is rooted in a combination of (a) newly minted arguments as to the methodology by which ARPU allegedly should have been computed in the first instance, in contravention of the limits imposed by the April 17 Order and directly at odds with the rate proposal, trial advocacy, and post-trial proposed findings of SoundExchange and its expert economists; and (b) a continuation of SoundExchange's relentless effort to capture for the record industry statutory license payments attributable to Sirius XM's performances of statutorily-exempt pre-1972 sound recordings via a deliberate misreading and conflation of the governing Gross Revenues definition and the separate Pre-1972 Recording Share. SoundExchange's position is not only wholly meritless, but all the more audacious given its failure to have so much as mentioned any of these points at any point during the proceeding, in response to Sirius XM's Motion for Rehearing, or in a rehearing motion of its own. These arguments should be swiftly rejected.

SoundExchange's brand new line of attack on the Judges' Determination is that the [redacted] ARPU used to convert the [redacted] per-subscriber royalty into a percentage-of-revenue rate failed to back out the revenues attributed to Sirius XM's performances of pre-1972 sound recordings. (This would have the effect of *reducing* the operative ARPU and *increasing* the effective percentage-of-revenue rate payable when ARPU is divided into [redacted].) As a matter of economics, its effect would be to offset the deductions Sirius XM is entitled to take on account of performances of pre-1972 sound recordings, thus rewarding the record industry with royalties for performances that are exempt from federal copyright law protection. That is just one of its crippling flaws: this proposed method for calculating ARPU also directly contradicts the method advocated by SoundExchange and its economists at trial and adopted by the Judges, which explicitly called for the *inclusion* of revenues earned from pre-1972 performances in calculating ARPU, and which provided (indeed itself proposed) that Sirius XM should continue to enjoy the well-established right to further reduce its royalty payment obligations by the Pre-1972 Recording Share *after* multiplying its Gross Revenues by the statutory royalty rate. So unabashed is SoundExchange in its motive for untimely flipping its trial position – to assure the record industry payments for precisely such statutorily exempt performances – that it professes the prejudice that would be worked upon that industry were the Judges instead to adhere to the law that exempts Sirius XM from such payments. The transparently meritless nature of SoundExchange's argumentation should be seen for what it is and rejected.

The balance of this Opposition establishes the following points:

First, having conceded the propriety of Sirius XM's math and the resulting appropriate adjustment to the effective percentage-of-revenue rate (SX Brief at 5 & Ex. A), SoundExchange's belated effort to identify a claimed methodological error in the manner in which the Judges calculated ARPU (failure to adjust for the subsequent Pre-1972 Recording Share) is improper under the explicit terms of the April 17 Order and in any event has been waived.

Second, SoundExchange's newly-conceived "economically and factually accurate" royalty-rate methodology (SX Brief at 2) is neither. The assertion that the ARPU calculation should have backed out revenues attributed to performances of pre-1972 recordings finds no support in the record, factually or economically. Indeed, that assertion is fundamentally at odds with what SoundExchange and its experts argued throughout the proceeding and in post-trial filings, namely, that the "conceptually appropriate method" for converting a per-subscriber royalty into an equivalent percentage-of-revenue rate is to use an ARPU that "includes **all**

revenue that Sirius XM attributes to the performance of sound recordings, **regardless of whether those sound recordings are pre-'72 or post-'72**, and regardless of whether they are directly licensed or statutorily licensed." As SoundExchange put it, "[t]his is the **only** way to obtain a conceptually accurate ARPU and, from there, an accurate royalty rate." SX PFF ¶ 143 (emphases added). That the per-subscriber royalty of [redacted] that the Judges arrived at was derived from the opportunity cost model put forward by Professor Willig rather than from Mr. Orszag's benchmarking analysis doesn't alter the propriety of this approach, and rests on a distinction already rightly rejected by the Judges.

Third, SoundExchange's new advocacy is nothing more than a naked attempt to eliminate the pre-1972 deduction – a result that is squarely at odds with a decade of CRB precedent establishing: (i) that Sirius XM should not pay SoundExchange for performances of pre-1972 recordings; (ii) that the adjustment for pre-1972 recordings is made to Sirius XM's royalty obligation after the royalty rate set by the Judges is applied to Sirius XM's defined Gross Revenues – not by adjusting Sirius XM's Gross Revenues; and (iii) that, as a result, Sirius XM will, by design, pay SoundExchange an effective percentage-of-revenue rate that is less than the statutory rate determined by the Judges based on market rates paid by other services in deals covering pre-1972 performances.

Fourth, SoundExchange's reach for a recent D.C. Circuit decision that purportedly "revisited the standard applicable to manifest injustice claims" (SX Brief at 14), represents another impermissible effort to reargue matters foreclosed by the April 17 Order. In all events, that authority in no way conflicts with the rationale of the April 17 Order.

ARGUMENT

I. SoundExchange's New Argument that The Judges Should Have Excluded from ARPU the Revenues Attributed to Performances of Pre-1972 Recordings Is Outside the Scope of the Rehearing Order and Waived

The April 17 Order could not be clearer in stipulating the limited scope of the instant briefing. The Judges recognized that it was "undisputed" and "unrebutted" that the ARPU used in the royalty rate calculation "must be commensurate with the Gross Revenues definition that the Judges applied." Order at 8. The questions posed to the parties were "whether the 15.5% royalty rate is based on an ARPU that is not commensurate with the Gross Revenue definition actually adopted," and "whether the royalty rate should remain at 15.5%, or be reduced to a rate not lower than 14.7%." *Id.* at 8-9. Consistent with resolution of that inquiry, SoundExchange concurs with Sirius XM as to the appropriateness of including in ARPU the items that were not accounted for in the [redacted] ARPU used by the Judges but which indisputably are to be included in reportable Gross Revenues, SX Brief at 5; nor does it dispute that the resulting math yields an ARPU of [redacted] and an effective percent-of-revenue of 14.7%. *Id.* at 7 & Ex. A. Inconsistent with the limited inquiry, however, SoundExchange predicates its argument that the "appropriate ARPU" implies a rate of 16.85% on a proposed *change* to the ARPU calculation methodology that it did not propose during the course of the proceeding (or by rehearing application), that is *not* "commensurate with the Gross Revenue definition actually adopted," and that is wholly inappropriate for consideration in connection with the issue remaining for resolution here. That change would, in disregard of the Gross Revenues definition, call for modifying the ARPU calculation to (a) infer from the Pre-1972 Recording Share an amount of revenue attributable to performances of pre-1972 sound recordings and (b) *exclude* that amount from ARPU, with the effect of *reducing* reportable ARPU and hence raising the effective percent-of-revenue payable by Sirius XM. The purpose of this new method of calculation, SoundExchange freely admits, is to ensure that the record industry captures the revenue earned by Sirius XM from its performances of *both* compensable post-1972 *and* non-compensable pre-1972 sound recordings. SX Brief at 10-14. But the Gross Revenue definition calls for exactly the opposite: *inclusion* of such revenue attributed to performances of pre-1972 recordings. And the Pre-1972 Recording Share is *not* part of the Gross Revenues definition or an adjustment Sirius XM makes to its Gross Revenues, but rather an adjustment made to Sirius XM's royalty obligation *after* Gross Revenues are calculated and the royalty rate applied. That prevailing structure is expressly designed to preserve Sirius XM's entitlement to perform pre-1972 sound recordings free of federal statutory royalties. SoundExchange's transparent attempt to circumvent that structure and the legal underpinnings for it is wholly improper and should be rejected.

SoundExchange's argument is also waived. The governing regulations are clear that "[a] party waives any objection to a provision in the determination unless the provision conflicts with a proposed finding of fact or conclusion of law filed by the party." 37 C.F.R. § 351.14(b); *see also* Order Denying Mot. for Rehearing at 3, Docket No. 2006-1 CRB DSTRA (Jan. 8, 2008) (deeming claims that were not made in proposed findings of fact or during the hearing to have been waived). As we detail in Point II below, the Judges' conversion methodology, based on an ARPU figure that included revenues attributable to pre-1972 recordings, was *consistent* with what SoundExchange argued in its proposed findings, not in conflict with it. It is far too late for SoundExchange to invent a new theory directly inconsistent with its position throughout the proceeding and then argue that the Judges erred by not adopting it.

II. SoundExchange's Effort to Redefine Gross Revenues to Exclude Revenue from Performances of Pre-1972 Recordings Is Not Found in the Record and is Directly at Odds with Its Trial Position, The Testimony of Its Experts, and Its Post-Trial Findings

a. SoundExchange's Newly-Invented Theory is Directly At Odds With Its Rate Proposal, Trial Advocacy, and Post-Trial Briefing

Throughout the proceeding, until now, SoundExchange's position has been clear: when converting a stated per-subscriber royalty into a percentage of revenue rate, the appropriate way to do so is by dividing that royalty by Sirius XM's ARPU, which must account for the revenues attributed to *all* of Sirius XM's performances, including performances of pre-1972 recordings. SoundExchange, in its Corrected Proposed Findings of Fact and Conclusions of Law, made this explicitly clear. There, in discussing the "conceptually appropriate method" for converting a per-subscriber royalty into an equivalent percentage-of-revenue rate, SoundExchange took the position that the ARPU used as the "denominator" for performing the conversion must "include[] *all* revenue that Sirius XM attributes to the performance of sound recordings, *regardless of whether those sound recordings are pre-'72 or post-'72*, and regardless of whether they are directly licensed or statutorily licensed." SX PFF ¶ 1431 (emphasis added). As SoundExchange put it, [t]his is the *only* way to obtain a conceptually accurate ARPU and, from there, an accurate royalty rate." *Id.* In flagrant disregard of that consistent advocacy, SoundExchange now takes the diametrically opposite position that revenues attributable to pre-1972 performances must be excluded from ARPU.

What is more, in its own rate proposal, SoundExchange proposed maintaining Sirius XM's entitlement to a downward adjustment to the per-subscriber and percentage-of-revenue rates SoundExchange was proposing so as to account for Sirius XM's performance of pre-1972 sound recordings. Am. Proposed Rates and Terms of SoundExchange, Inc. and Copyright Owner and Artist Participants at 5-6, June 14, 2017. Such an adjustment, by definition, would reduce the effective royalty proposed by SoundExchange to something less than the rates SoundExchange asserted were called for by marketplace evidence. *Never*, throughout the entirety of this proceeding (until now), did SoundExchange suggest what it proposes here: that the rate to be set by the Judges must first be adjusted upwards to offset subsequent deductions for performances of statutorily exempt performances under the Pre-1972 Recording Share, such that the record industry ends up being paid royalties for such performances as if they were compensable. Such a suggestion is found nowhere in the record, in SoundExchange's post-trial briefing, or even in its opposition to Sirius XM's Motion for Rehearing, where the question of the proper ARPU was explicitly confronted.

b. SoundExchange's Expert Witnesses Disagreed With Its New Advocacy

SoundExchange's reversal of position is not only at odds with its own rate proposal and trial position, but also with the testimony of its own expert witnesses. Mr. Orszag, the proponent of the [redacted] ARPU used by the Judges in the Initial Determination, could not have been clearer: to arrive at a conceptually appropriate measure of ARPU for converting a per-subscriber royalty into a percentage-of-revenue rate, it was imperative that the ARPU used match the going-forward definition of Gross Revenues, 4/25/17 Tr. 1000:12-1001:21 (Orszag), and that the revenues attributed to *all* performances – including those of pre-1972 recordings – must be included. Orszag AWDT n.73 & App. D. Indeed, when calculating the [redacted] ARPU, Mr. Orszag explicitly made an adjustment to his ARPU figure to ensure that the revenues attributed to performances of pre-1972 recordings were *included*. Orszag AWDT n.73.

Lest there be any doubt, Mr. Orszag used the [redacted] ARPU in precisely the same way as the Judges used it: to convert a derived per-subscriber rate into an equivalent percentage-of-revenue rate. Specifically, in his "Approach Two," Mr. Orszag first arrived at a per-subscriber rate from his preferred interactive services benchmark and then used an ARPU of [redacted] – one that explicitly accounted for revenues attributed to performances of both pre- and post-1972 recordings – to convert that per-subscriber rate into "an equivalent percentage-of-revenue rate." Orszag AWDT ¶ 58. Following his lead, the Judges adopted precisely this approach to convert the [redacted] per-subscriber rate that they deemed appropriate in an effort to arrive at an equivalent percentage of revenue rate.

Professor Lys, another SoundExchange expert witness, also used ARPU to convert a proposed per-subscriber royalty of $1.68 into a percentage of revenue rate. Like Mr. Orszag, he explicitly made sure to *include* the revenues attributed to performances of pre-1972 sound recordings in that ARPU. Lys WRT ¶ 155. SoundExchange's current advocacy is flatly contradictory to that methodology.[1]

At the end of the day, the only methodology put forward by SoundExchange and its experts to convert a per-subscriber royalty into a percentage-of-revenue rate unambiguously called for the inclusion of the revenue attributable to performances of pre-1972 recordings – precisely what the Judges did, and precisely the *opposite* of what SoundExchange now claims. Simply put, there is no legitimate basis for SoundExchange to object to the Judges doing what it itself proposed. SoundExchange's belated tactical change of position should be rejected.

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[1] Professor Willig identified the minimum monthly per-subscriber fee he believed Sirius XM should pay but did not convert that figure into a percentage-of-revenue rate. He nonetheless testified elsewhere that "for purposes of converting [a] per-subscriber-month rate into a percentage-of-revenue rate," the "correct" ARPU to use is the same [redacted] promoted by Mr. Orszag and Professor Lys – an ARPU that (as noted above) includes revenues attributed to performances of pre-1972 recordings. Willig WRT ¶57 (critiquing Shapiro WDT). We discuss Professor Willig's approach in more detail in the following section.

c. SoundExchange's Attempt to Distinguish Its Benchmarking Analyses From Its Opportunity Cost Analysis is Meritless

Tacitly recognizing the complete reversal of its trial position, SoundExchange attempts to explain it away by claiming that the Judges should ignore its prior advocacy and that of its experts on the pretext that its reasoning applies only to per-subscriber rates derived from benchmark agreements that call for payments for performances of pre-1972 recordings, SX Brief n.11 – that, instead, some different measure of ARPU is needed to convert a per-subscriber rate derived from an opportunity cost analysis. SoundExchange's position is meritless.

To start, the claim that some different ARPU is needed to convert a per-subscriber royalty derived from an opportunity cost analysis as compared to a per-subscriber royalty arising from a benchmarking analysis is entirely new. The record is barren of evidence or any proposed findings suggesting that the methodology used to convert a per-subscriber royalty would be inappropriate if the Judges were to credit Professor Willig's opportunity cost analysis. Professor Willig himself made no such a suggestion. He identified the minimum monthly per-subscriber fee he believed Sirius XM should pay without converting that figure into a percentage-of-revenue rate. Willig WDT ¶ 45. But nowhere in his testimony did he claim – as SoundExchange does now with its proposed 16.85% rate – that his proposed royalty fee should be *inflated* so as counteract the effect of Sirius XM's subsequent pre-1972 adjustments, or that an entirely different approach than that taken by SoundExchange's other experts would be needed to convert his proposed per-subscriber fee into a percentage-of-revenue rate. To the contrary, SoundExchange used his testimony to support a rate proposal where *both* the per-subscriber *and* percentage-of-revenue rates would be further *reduced* by the pre-1972 Recording Share, not increased to insulate the record industry from the economic effect of Sirius XM's performances of statutorily exempt sound recordings.

In any event, the distinction that SoundExchange attempts to draw – between a benchmarking analysis and its opportunity cost analysis – has already been found by the Judges to be one without a difference. As the Judges recognized, Sirius XM was correct in pointing out that "Professor Willig's opportunity cost approach is the *equivalent* of a benchmarking approach." Initial Determination at 45 (emphasis added). That is for good reason. Professor Willig's opportunity cost analysis is nothing more than a weighted average of the rates paid by a variety of benchmark services. *Id*. at 45-47.

Were that not enough, the benchmark services used by both Mr. Orszag and Professor Willig (with immaterial exceptions) pay for performances of pre-1972 sound recordings, whereas Sirius XM is under no obligation to do so through the statutory license.[2] As the Judges have recognized for years, it therefore is entirely appropriate for Sirius XM to ultimately reduce its royalty obligations and pay something less than the rates paid by these benchmark services to account for this distinction, not to have the statutory rate inflated to nullify it. Any other conclusion would force Sirius XM to pay for performances of pre-1972 recordings under the statutory license.[3]

[2] Mr. Orszag's benchmarking analysis was based entirely on the rates paid by subscription interactive services that pay for performances of pre-1972 recordings. Orszag AWDT ¶¶ 28-30, 93-95. Professor Willig's analysis was likewise dominated by rates that include payment for pre-1972 recordings: only [redacted] of his [redacted] opportunity cost came from services *not* making such payments (ad-supported non-interactive services); that number would not change materially even if such services did pay for pre-1972 performances. *See* Willig WDT at 27 (tbl. 2); *id.* at B-6, ¶ 7.

[3] Were SoundExchange's new theory credited, Sirius XM would end up paying *twice* for certain performances of pre-1972 sound recordings – once through the statutory license and then again through the private agreements it has entered into to settle various state law litigations.

III. SoundExchange's Proposal That Sirius XM Pay for Pre-1972 Recordings Contradicts Years of CRB Precedent to the Contrary

As described in prior sections, SoundExchange's argument boils down to the suggestion that the Judges should manipulate the ARPU calculation to increase the percentage royalty rate just enough so that Sirius XM's payments, *after* the pre-1972 recording share, net out to [redacted] per subscriber, thereby canceling out any benefit Sirius XM would otherwise obtain from the Pre-1972 Recording Share. In sum and substance, SoundExchange is using the fortuity of additional rehearing briefing as an impermissible vehicle to try yet again to force Sirius XM to pay SoundExchange for pre-1972 recordings not covered by the statutory license. The Judges should reject this untimely attempt to re-litigate an issue SoundExchange has lost time and time again in prior proceedings.

The CRB and D.C. Circuit have repeatedly affirmed that it is appropriate for Sirius XM to discount its royalty payments *below* the rates otherwise called for to reflect the lack of federal copyright protection in pre-1972 recordings. In *SDARS I*, the Judges rejected SoundExchange's proposed "expansive" revenue definition that included "all revenue paid or payable to the SDARS" and excluded "only revenues that are entirely unrelated to the provision of" satellite radio service, *SDARS I*, 73 Fed. Reg. 4087, and instead adopted the more tailored definition proposed by Sirius and XM, which excluded revenue from programming "for which the performance of sound recordings…is exempt from any license requirement." 37 C.F.R. § 382.11 ("Gross Revenues" definition) ¶ (3)(vi)(D). When SoundExchange later sued Sirius XM for using the above-described exclusion to carve out revenues attributed to performances of pre-1972 recordings (and thus lower its otherwise applicable royalty payments), the Judges confirmed the exclusion at issue was put in place specifically for that reason, finding that "it would be anomalous to require Sirius XM to pay for pre-'72 recordings under a federal compulsory license when, by the unambiguous statutory language in section 301 of the Copyright Act, those recordings are not subject to federal copyright protection." Ruling on Regulatory Interpretation, 82 Fed. Reg. 56732 (Nov. 30, 2017).

The Judges reached a similar conclusion in *SDARS II*, where SoundExchange proposed "to eliminate from the current *Gross Revenues* definition a provision that authorizes an exclusion for revenues received from channels and programming that are licensed outside the Sections 112 and 114 licenses, which includes pre-1972 recordings." *SDARS II*, 78 Fed. Reg. 23054, 23073 (Apr. 17, 2013). Again, the Judges rejected that proposal out of hand, holding that "Pre-1972 recordings are not licensed under the statutory royalty regime and should not factor into determining the statutory royalty obligation." *Id.* The Judges also made another important adjustment to the governing regulations, ordering that, going forward, the pre-1972 adjustment should be made to Sirius XM's royalty payments *after* the royalty rate adopted in the proceeding was multiplied by Sirius XM's Gross Revenues, and not through an adjustment to Sirius XM's Gross Revenues. *See id.* ("[T]he proper approach is [a] deduction from the total royalty obligation to account for performances of pre-1972 recordings."). The D.C. Circuit affirmed the *SDARS II* Determination, holding that "[t]he Judges acted within their broad discretion when permitting a separate deduction for revenues associated with the use of pre–1972 works." *Music Choice v. Copyright Royalty Bd.*, 774 F.3d 1000, 1010-12 (D.C. Cir. 2014).

Taken together, clear precedent dating back to 2007 – affirmed by the D.C. Circuit – establishes several key principles: *First*, that Sirius XM should not pay SoundExchange for performances of pre-1972 recordings. *Second*, that the adjustment for pre-1972 recordings (since 2013) is made to Sirius XM's royalty obligation after the royalty rate set by the Judges is applied to Sirius XM's defined Gross Revenues – not by adjusting Sirius XM's Gross Revenues. *Third*, that Sirius XM will, as a result, pay SoundExchange an amount *less* than the royalty rate established by the Judges multiplied by its Gross Revenues – *by design*. As noted above, *never* has there been the suggestion – by either the Judges or SoundExchange – that the rate should be preemptively raised to something *above* the reasonable level so as to counteract the effect of the pre-1972 adjustments that Sirius XM may later take. To afford such relief to SoundExchange now would nullify the pre-1972 deduction and violate the core principle animating CRB Determinations since 2007 that Sirius XM should not pay SoundExchange for those performances.

IV. SoundExchange's Reargument as to What Would Cause Manifest Injustice is Improper and Lacking in Merit

The Judges have already determined that a limited rehearing was appropriate under Federal Rule of Civil Procedure 59(e) because "it would be manifestly unjust to maintain a royalty rate that was not based on the Gross Revenues calculation methodology that prevailed at the time the record was closed in the current proceeding." Order at 7. The limited scope of the instant briefing precludes challenging that determination. SoundExchange nonetheless attempts to do so, on the asserted grounds that a recent D.C. Circuit case, *Leidos, Inc. v. Hellenic Republic*, 881 F.3d 213 (D.C. Cir. 2018), compels a finding that Sirius XM has not made the requisite manifest injustice showing.[4] SX Brief at 14. No such conclusion is warranted. *Leidos*

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[4] SoundExchange similarly goes well beyond the permitted scope of the parties' rehearing briefing (not to mention the record in this proceeding) when pointing to Sirius XM's preliminary statement of issues in a separate proceeding in an effort to support the assertion that Sirius XM "seeks to reduce its royalty obligations during the *SDARS III* period on the basis of the Judges' Ruling on Referral" while, at the same time, "it seeks to overturn that very same ruling through its D.C. Circuit appeal." SX Brief at 19. Even were it appropriate to make such an argument here, and it is not, the premise on which this argument relies is wrong. Sirius XM's Motion for Rehearing is entirely based on the need to correct the ARPU used so that it matches the definition of Gross Revenues adopted by the Judges in the Initial Determination in this proceeding. Sirius XM's arguments relating to the Judges' Ruling on Referral involve payments

breaks no new ground nor modifies the governing test for determining manifest injustice. It is also plainly distinguishable on its facts.

Leidos involved a litigant who claimed injustice when denied relief (a judgment converted to dollars instead of euros) that could have been requested at any time prior to the entry of judgment but was not, who failed to offer any reason for delay, and who in fact explicitly requested a judgment in euros in various prior filings. *Id.* at 219. This clearly is distinguishable from the instant circumstances, in which Sirius XM has only asked that the Judges revise the selected ARPU to make it consistent with the definition of Gross Revenues – something that Sirius XM and its experts advocated for throughout the proceeding and in post-hearing briefing. Order at 7-9.

Fresh Kist Produce, LLC v. Choi Corp., 251 F. Supp. 2d 138 (D.D.C. 2003), the decision relied on by the Judges, remains the more pertinent authority, and fully supports the finding of manifest injustice. Just as the plaintiff in *Fresh Kist* "explicitly requested that [the] court apply pre-judgment interest in calculating [its] award," SX Brief at 16 (citing 251 F. Supp. 2d at 141), Sirius XM explicitly asserted that the Judges should adopt an ARPU that matches the going-forward Gross Revenues definition. Order at 8.

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in prior periods and are therefore completely irrelevant here (other than highlighting the more important fact that Sirius XM's ARPU in prior periods excluded revenues that must now be included).

CONCLUSION

For the foregoing reasons, and for those set forth in Sirius XM's Memorandum in Response to the Judges' Rehearing Order and in its Motion for Rehearing, Sirius XM respectfully requests that the Judges correct for the use of an improper measure of ARPU, and reduce the SDARS royalty rate for the 2018-2022 license term from 15.5% to 14.7% in their Final Determination.

Dated: May 29, 2018

Respectfully submitted,

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Certificate of Service

I hereby certify that on Wednesday, May 30, 2018 I provided a true and correct copy of the Sirius XM's Opposition to SoundExchange's Rehearing Brief (Public) to the following:

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